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No. 05-381

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

WEYERHAEUSER COMPANY,
Petitioner,
v.
ROSS-SIMMONS HARDWOOD
LUMBER COMPANY, INC.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF LAW PROFESSORS IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF LAW PROFESSORS

This brief *amici curiae* in support of petitioner is respectfully submitted by the following individuals ("Law Professors"):

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[1] Letters granting consent to the filing of this brief have been filed with the Court. This brief was authored entirely by *Amici* and their counsel, and not by counsel for any party. None of the *Amici* has any financial interest in this matter or has been compensated to participate in this brief, and no person other than *Amici* and their

INTEREST OF *AMICI CURIAE*

Amici Curiae are law professors at American law schools who specialize in antitrust and have written about the monopolization offense under Section 2 of the Sherman Act. *Amici* are deeply concerned about the deleterious effects on price competition and the resultant adverse impact on consumers of the jury instruction approved by the Ninth Circuit.

INTRODUCTION

Amici support Petitioner's argument that the Ninth Circuit erred in permitting the jury to assess liability based on an instruction that departed from any basis that has been articulated for Section 2 liability and instead premised liability on the jury's determination whether defendant paid a "higher price . . . than necessary" or plaintiff was unable to obtain inputs at "a fair price." *Amici* submit this brief to share with the Court their expertise in the treatment of the monopolization offense in adjudicated cases and the difficulties that arise when juries are directed to assess liability based on idiosyncratic jury instructions like that approved by the Ninth Circuit. *Amici* believe that the Ninth Circuit's opinion sets a dangerous and chilling precedent on what this Court has described as the core of competition — unilateral pricing decisions. *Amici* also believe that the Ninth Circuit's opinion requires no showing of harm to consumers from the challenged behavior and that it imposes liability for what is almost certainly competitively benign conduct.

SUMMARY OF ARGUMENT

The jury instruction given by the district court and approved by the Ninth Circuit — which permitted the jury to

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counsel has made any monetary contribution to the preparation or submission of this brief.

find liability if it found that Weyerhaeuser paid a higher price "than necessary" and that this caused Ross-Simmons not to be able to purchase inputs at "a fair price" — is deeply flawed. This Court has long rejected a mode of antitrust analysis that measures liability by the fairness or reasonableness of prices and jurors cannot be expected to perform their function rationally or coherently under such an instruction. On the other hand, an instruction requiring a showing that the alleged predatory overbidding caused Weyerhaeuser to price below cost and that this created a dangerous probability that Weyerhaeuser could recoup its costs of predation by monopsony or monopoly power that harms consumers would be squarely in line with this Court's precedents and provides ample protection to consumers, the primary beneficiaries of antitrust law.

ARGUMENT

Ross-Simmons sued Weyerhaeuser for monopolizing or attempting to monopolize the "input market" for alder sawlogs through several allegedly exclusionary acts. The focus of the Ninth Circuit's decision and Weyerhaeuser's appeal is on two of the allegedly wrongful acts: (1) predatory overbidding (*i.e.*, paying a higher price for sawlogs than necessary); and (2) predatory overbuying (*i.e.*, buying more sawlogs than necessary).[2]

Focusing specifically on the predatory overbidding and overbuying claims, the district court instructed the jury that it could find Weyerhaeuser liable if Weyerhaeuser had "purchased more logs than it needed or paid a higher

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[2] The Ninth Circuit stated that it was not analyzing the predatory overbuying claims separately from the overbidding claims, *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1041, 1041 n.42 (9th Cir. 2005), and we treat the claims as functionally interchangeable for purposes of this case.

price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price." *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1039 n.30 (9th Cir. 2005). The Ninth Circuit found that these instructions "fairly and adequately cover[ed] the issues presented, correctly state[ed] the law, and [we]re not misleading." *Id.* at 1040. The Ninth Circuit rejected Weyerhaeuser's argument that the District Court should have required Ross-Simmons to prove that the predatory overbidding and overbuying had caused Weyerhaeuser to operate at a loss. *Id.* at 1046. The court held that predatory overbidding and overbuying cases are not governed by *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), which required that a plaintiff asserting a predatory pricing claim prove that the defendant priced below an appropriate measure of cost and that a dangerous probability existed that the defendant could recoup the costs of predation by exercising monopoly power later.

The Ninth Circuit's approach was erroneous. The jury instruction it approved offers no judicially manageable standards for resolving predatory overbidding and overbuying cases. Further, there is a workable alternative squarely grounded in this Court's precedents: a plaintiff alleging predatory overbidding or overbuying must show that (1) the allegedly predatory bidding caused the defendant to price its output below the appropriate measure of cost, and (2) the defendant's conduct created a dangerous probability that defendant would be able to recoup the costs of predation and harm consumers through the exercise of monopsony power in the input market or monopoly power in the output market.

This Court has made clear that antitrust law is directed primarily at preventing harm to consumers. In every anti-

trust lawsuit and especially a competitor lawsuit, a theory of consumer harm and a factual story of consumer harm are necessary. The Ninth Circuit did not require, and Ross-Simmons did not provide, either. Nor can consumer harm be implied from overbidding for an input and the subsequent demise of some competitors. The chain of possible consumer harm is much more complicated, especially in a case like this where there is a competitive end market. In the absence of a theory and showing of consumer harm, the competitor suffers no antitrust injury, and the case must be dismissed for that reason alone. There is not a hint of evidence that Weyerhaeuser's conduct threatened reduced output or caused higher prices to consumers. To the contrary, the approach taken by the Ninth Circuit threatens to harm consumers by chilling firms from engaging in aggressive bidding for inputs they need to produce goods and services.

I. INSTRUCTING JURIES TO LOOK FOR "FAIR PRICES" COURTS DISASTER.

The jury instruction given by the District Court and approved by the Ninth Circuit is the Achilles' heel of the Ross-Simmons's verdict. As noted, the only specific guidance the jury was given as to the predatory overbidding and overbuying claim required a determination whether Weyerhaeuser had purchased more logs or paid a higher price than "necessary" or Ross-Simmons had been deprived of the opportunity to purchase "at a fair price." The jury was left with no guidance as to what constitutes "necessity" or "a fair price." In effect, the district court and Ninth Circuit delegated to the jury discretion to make industrial policy unfettered by any concrete guidelines.

Since its earliest cases, this Court has consistently rejected efforts to judge competitive conduct by whether the prices resulting from the conduct were "fair" or "reason-

able." *See* Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 22 (2d ed. 1993) (showing that in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), Justice "Peckham saw that a reasonable-price standard was no standard"). In then-Judge Taft's words, such an approach "set[s] sail on a sea of doubt" because the fairness or reasonableness of a price is an illusory question in the antitrust context. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899); *see also Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) ("[H]ow is a judge or jury to determine a 'fair price?'"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945) (rejecting approach to monopolization cases that would ask whether defendant had earned more than a "fair profit").

The jury here had no basis, other than intuition, speculation, and idiosyncratic moral judgment, to decide whether Ross-Simons was able to obtain alder sawlogs at a "fair price," or whether Weyerhaeuser paid a price higher "than necessary." *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (noting that "[t]he concern that § 2 might be applied so as to further anti-competitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics").

It is particularly inappropriate to ask juries to scrutinize the "fairness" of prices in monopolization cases. Most jurors have no expertise in microeconomics or industrial organization policy and no basis to decide whether a particular price is the "right one" in some supposedly objective but utterly undefined way. As Professor Hovenkamp has observed, "juries remain a very weak link in a system where most of the relevant evidence is economic and

technical." Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 63 (2005).

Juries perform their function best when called upon to decide matters that are within common human experience. For example, price fixing and bid rigging cases are often fairly ordinary conspiracy cases where the ultimate question is whether two or more people agreed to a particular course of action. In such cases, the jury can rely on its familiarity with the dynamics of human interaction, the ordinary meanings of words, the significance of phone logs, correspondence, and similar evidence of contacts between the alleged conspirators, the credibility of witnesses, and other familiar evidence. In a monopolization case, such common sense questions are rare or nonexistent. The ultimate question that underlies monopolization liability is whether the defendant obtained, maintained, or attempted to obtain monopoly power by excluding rivals through "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident," which requires "an element of anticompetitive *conduct*." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (internal quotation marks omitted). Resolving such questions requires a detailed economic understanding of competition in the relevant market, a matter wholly outside the ken of most jurors.

Jury research confirms that jurors struggle mightily to keep up in complex antitrust cases. Professor Arthur Austin's interviews with jurors in four antitrust cases, including the *Brooke Group* predatory pricing case resolved by this Court, is instructive. Professor Austin concluded:

> [T]the jurors were overwhelmed, frustrated, and confused by testimony well beyond their comprehen-

> sion. I concluded that at no time did any juror grasp — even at the margins — the law, the economics or any other testimony relating to the allegations or defense. . . . [A]t no time have I ever encountered a juror who had the foggiest notion of what oligopoly, market power, or average variable costs meant, much less how they applied to the case.

Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 Denv. U. L. Rev. 51, 54 (1995).

Given the difficulty that jurors face in understanding the economic matters that they are supposed to resolve, courts like the district court and Ninth Circuit here sometimes make the mistake of presenting jurors with "fairness" questions, thinking that this will somehow make the jurors' job easier. But, as this Court has repeatedly held, the antitrust law of monopolization is not about fairness or business ethics. It is about preventing the use of market power to suppress competition, and thereby preserving market-determined prices and levels of product quality for the benefit of consumers. Giving jurors fairness instructions only exacerbates the confusion and incoherence that can result from asking juries to decide monopolization cases.

Under our federal system, juries have a role to play in monopolization cases. But great care must be given to framing issues for jurors in way that makes it likely that the issues will be resolved in a coherent, rational, and reliable way. Punting broad questions of industrial policy to juries under mantras such as "fairness" and "reasonableness" invites arbitrary, erroneous, and socially disastrous policy-making.

II. A COST/REVENUE TEST AND RECOUPMENT REQUIREMENT FOR PREDATORY OVERBUYING AND OVERBIDDING CASES ARE APPROPRIATE.

If the rudderless jury instruction approved by the Ninth Circuit is inappropriate, what would be an appropriate instruction for a predatory overbidding and overbuying case? *Amici* submit that the proper instruction would require the jury to find that the alleged predatory overbidding and/or overbuying on the input side caused the defendant to price below an appropriate measure of cost[3] on the output side and that the structure of the market created a dangerous probability that the defendant would be able to recoup the cost of its below-cost sales and harm consumers.

The Ninth Circuit rejected any such requirement based on a deeply flawed reading of this Court's precedents. It noted that, in *Brooke Group*, this Court found that even allegedly predatory price cuts bring immediate short-term benefits to consumers and that courts should therefore be reluctant to create liability rules discouraging price cutting without a strong showing that the discounting was likely to result in future supracompetitive pricing. 411 F.3d at 1037. The Ninth Circuit then found that, unlike predatory pricing on the output side, predatory overbidding on the input side does not bring immediate short-run benefits to consumers and, hence, the logic of the *Brooke Group* rule

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[3] This Court has not yet decided what is the appropriate measure of cost of predatory pricing cases, and there is a split among the circuits on this issue. *See* Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. 1, 4 n.10 (2005). The Court need not resolve this issue in this case since Ross-Simmons never showed that Weyerhaeuser priced its output below *any* measure of cost.

does not apply to predatory overbidding and overbuying. *Id.* at 1037-38.

The Ninth Circuit overlooked much of *Brooke Group's* reasoning and this Court's other predatory pricing precedents. Yes, this Court has expressed a resolve to protect price cutting because of its immediate consumer benefits. But the Court has also relied on a variety of other considerations that the Ninth Circuit did not consider. In particular, in framing stringent predatory pricing liability rules, this Court has relied on: (1) the general (though of course not complete) implausibility of predatory pricing allegations; (2) the difficulties of administering liability rules governing price competition; (3) the risk of chilling aggressive price competition; and (4) the immediate benefits to consumers of reduced prices. The Ninth Circuit reduced *Brooke Group* and this Court's other precedents to just the last factor. But the logic of this Court's precedents, and the very theory of predatory pricing and predatory overbidding, reveal that the two practices are usually two sides of the same coin and share all of the concerns that motivated this Court's predatory pricing decisions. Accordingly, the liability rules governing both practices should be symmetrical.

First, the Ninth Circuit missed this Court's guidance that allegations of predatory pricing schemes are inherently suspect because predatory pricing is a highly risky strategy unlikely to be undertaken very often. This was the Court's central concern in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), which curiously escaped the Ninth Circuit's attention. In *Matsushita*, this Court noted that predatory pricing "is by nature speculative" because it requires a sacrifice of short-run profits with the hope that competitors will be excluded from the market and that new entrants will be deterred

from entering for long enough to permit the defendant to maintain its monopoly and recoup the costs of predation. *Id.* at 588-90. Thus, "predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* at 587; *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 121 (1986) (observing that predatory pricing occurs infrequently).

The same goes for predatory overbuying and overbidding on the input side. Firms usually do not make money in input markets; they make money in output markets — that is, by selling things. The exclusionary mechanism of a predatory bidding scheme is therefore identical to that in a predatory pricing scheme. The predator must accept a short-term sacrifice of profits in the hopes that rivals will be driven from the market for long enough to permit future recoupment. A rival will be driven from the market only if it becomes unprofitable to stay in the market.[4] That will only occur if the rival would lose money by matching the defendant's price for the raw materials and then selling its products at market prices.

Consider the choices facing the rival that believes that another firm is embarking on a predatory overbidding campaign in order to obtain monopsony power in the up-

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[4] Indeed, in *Cargill* the plaintiff asserted a type of predatory overbidding theory similar to Ross-Simmons's. It asserted that, as a result of the challenged merger, the defendant would both "bid up the price it would pay for cattle" (the input side) and "reduce the price at which it sold boxed beef." 479 U.S. at 114. This Court quite correctly treated both of these claims as involving predatory pricing allegations. *Id.* at 117-18. Price competition can exclude a rival from the market by either increasing its costs (the input side) or decreasing its revenues (the output side). Either way, the rival's decision whether to stay in the market or exit comes down to the same calculation — whether revenues exceed costs.

stream market.[5] If the predator unnecessarily increases its bid, the rival must consider whether it is better off matching the predator's bid or exiting the market. If the rival could match the predator's bid and still make money selling its product, it will not exit the market and the predator will never obtain monopsony power. Any bid increase by the predator that does not result in the predator pricing below cost in the output market cannot exclude an equally efficient rival. Thus, a predatory overbidding or overbuying claim is conceptually identical to a predatory pricing claim. Predatory overbidding or overbuying is just as difficult to execute and just as unlikely to occur. If the alleged predator did not price its output below cost in a market conducive to recoupment and resulting consumer harm, it is not economically plausible that the defendant was a predator at all.[6] *See Matsushita*, 475 U.S. at 593 ("[C]ourts should not permit factfinders to infer conspiracies when such inferences are implausible, because the

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[5] Ross-Simmons did not prove that Weyerhaeuser had any prospect of obtaining monopoly power in the downstream (output) market for hardwood lumber. This is a key failure of proof. It means that this is not a case where the defendant could have harmed consumers and profited by raising its rival's costs of production and consequently forcing a price increase in the output market. *See* Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L. J. 669, 679 (2005).

[6] In theory, a predator that lacks market power in the output market might attempt to recoup the costs of predatory overbidding by bidding down the price of inputs and decreasing its purchases of those inputs, consequently decreasing its output, but having no effect in the output market. However, such a strategy would not harm consumers since other competitors in the output market would pick up the slack from the predator's reduced sales and, therefore, prices and output in the output market would be unaffected. In any event, whether the predator sought to recoup in the input market or the output market, a predatory overbidding situation could not exclude equally efficient rivals unless it forced them to price below cost in the output market.

effect of such practices is often to deter procompetitive conduct.").

Second, this Court has expressed deep reservations about the administrability of liability rules sanctioning unilateral pricing behavior. A firm's unilateral decision to set its own price, whether to buy or sell, is the very essence of competition and deserves the fullest judicial protection except in the most egregious cases. In *Trinko*, this Court repeated its admonition from *Brooke Group* that "above-cost predatory pricing schemes, '[are] beyond the practical ability of a judicial tribunal to control.'" 540 U.S. at 414. As noted above, any test focusing on "fair," "reasonable," or "necessary" prices is impossible to administer whether it focuses on prices that are too low on the output side or too high on the input side.[7] A court should not condemn price competition unless it is certain that it can distinguish between socially beneficial and harmful behavior with a high degree of accuracy. A test that requires a concrete determination of the defendant's costs and revenues is administrable. The standard adopted by the district court and Ninth Circuit is not.

Third, this Court has expressed a deep concern that ill-crafted liability rules governing price competition could chill socially beneficial behavior. *See Brooke Group*, 509 U.S. at 226. The Ninth Circuit seems not to have recognized this danger. Although it admitted that "rising input

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[7] Not all of Amici believe that the *Brooke Group* below-cost test should apply in all circumstances, for example where an incumbent monopolist engages in above-cost limit pricing to deter entry by a new firm that has not yet achieved economies of scale. *See* Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 Yale L. J. 941 (2002). However, no such concern is presented here, since Ross-Simmons was already in the market at the time of the allegedly predatory overbidding and Weyerhaeuser is not accused of predatory selling.

prices" can benefit consumers, it did not believe that predatory overbidding in supply-inelastic markets (markets where the suppliers are unlikely to increase output in response to price increases) is valuable to consumers. 411 F.3d at 1038. But even if consumers would not benefit from aggressive bidding in any particular case, it would be wrong to frame liability rules for unilateral price competition around the features of any individual case. In sensitive areas like unilateral price competition, courts must be attuned to the systemic effects of the liability rules they announce and the danger of false positives.

In particular, courts must be concerned that loose liability standards governing unilateral price competition become tools for strategic misuse of antitrust law by rent-seeking rivals. A growing literature shows that competitors often misuse antitrust law to prevent aggressive and socially beneficial competitive behavior by rivals. *See* Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. 1, 5-32 (2005); R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of the Antitrust Laws*, 2 J. Strategic Mgmt. Educ. 37, 37-38 (2005); Edward A. Synder & Thomas E. Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991); William J. Baumol & Janusz A. Ordover, *Use of Antitrust To Subvert Competition*, 28 J. L. & Econ. 247 (1985); Frank H. Easterbook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 33-39 (1984). The threat of a treble damages suit can deter firms from engaging in aggressive competition even if the probability that the plaintiff will win the case is low.

The Ninth Circuit's opinion gives plaintiffs carte blanche to assert predatory overbidding cases without undertaking cost/revenue comparisons or proving the possibility of recoupment simply by alleging that the supply

market was inelastic. This creates a dangerous loophole in predatory pricing law that will encourage and enable firms to exploit monopolization law to achieve anticompetitive purposes. Instead of bringing predatory pricing claims that would not meet *Brooke Group's* requirements, plaintiffs will recharacterize essentially the same claims as predatory overbidding allegations. Even the Ninth Circuit acknowledged that aggressive bidding on raw inputs often does benefit consumers by attracting new entry or increased supply into the market. 411 F.3d at 1038. As this Court noted in *Trinko*, "[t]he cost of false positives counsels against an undue expansion of § 2 liability." 540 U.S. at 414.

Finally, the Ninth Circuit found that predatory overbidding in supply-inelastic markets does not bring benefits to consumers since it does not result in an increase in supply. Here, again, the court's analysis was flawed in numerous respects.

First, unless supply is *perfectly* inelastic (and virtually no market matches this hypothetical proposition), predatory overbidding brings immediate benefits to consumers. During the period of alleged predation, the increased price of the inputs attracts a greater supply of the inputs, which in turn increases the supply in the output market, which in turn causes prices to fall in the output market. Thus, except in the extraordinary case of *perfectly* inelastic supply, consumers often do realize lower prices in the short run from predatory overbidding.

Second, if the supply of the input were perfectly inelastic, then injury to consumers would not have resulted from the achievement of monopsony power (buyer market power). The ordinary concern with monopsony is that the buyer will *depress* the price of the inputs it is purchasing, that because prices are depressed it must cut its purchases

of inputs because suppliers are less willing to sell at the artificially depressed prices, and that consequently the monopsonist must cut its output since it has fewer raw materials to use in production. 12 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 2011(b2), at 129 (2d ed. 2005). In order for consumers to be harmed in this way, the monopsonist must face an *elastic* supply curve — that is, suppliers must be willing to supply a smaller quantity of raw materials at the depressed prices — and the monopsonist must also have downstream market power. But, here, the Ninth Circuit explicitly rested its holding on the finding that supply was *inelastic* — that alder sawlog suppliers would not change the amount they were willing to supply based on changes in the price of alder sawlogs. If that is true, then consumers would not be harmed even if Weyerhaeuser obtained monopsony power, since it would still buy the same amount of sawlogs at the depressed prices and therefore would not have to lower its output in the hardwood lumber market.

Third, and relatedly, it is quite clear from the facts that Weyerhaeuser could not possibly have harmed consumers by obtaining monopsony power over alder sawlogs, even if it could have recouped by paying less than a competitive price and reducing its purchases of sawlogs. Significantly, there is no separate market for alder lumber and Weyerhaeuser had only a very small market share in the hardwood lumber market — the relevant output market. ER 581-82; ER 405. Given the fact that Weyerhaeuser had no market power in the output market, it would have been impossible for Weyerhaeuser to have recouped the costs of predatory overbidding by charging higher prices to its customers. Whatever else this case may be about, it is not about injury to consumers. *See Schor v. Abbott Labs.*, No. 05-3344, 2006 WL 2062117, at *3 (7th Cir.

July 26, 2006) (Easterbrook, J.) ("[I]f a manufacturer cannot make itself better off by injuring consumers through lower output and higher prices, there is no role for antitrust to play.").

Finally, the Ninth Circuit ignored efficiency benefits to consumers from having resources allocated to the buyer who values them the most. In the ordinary case, the firm paying the highest price for raw inputs will be the firm that is most efficient at using those inputs to create products that consumers want to buy. Legal impediments to aggressive price competition for raw inputs arising from the Ninth Circuit's irretrievably vague standard of Section 2 liability would have the effect of distorting the market allocation mechanism by allocating resources to firms that value them less than the firms that would buy them absent the legal impediments.

In short, the concerns that animated this Court's prior predatory pricing decisions apply also in cases of alleged predatory overbuying or overbidding. If anything, predatory overbuying and overbidding pose less of a threat to consumers than predatory pricing, since a predator might achieve monopsony power in the upstream market and yet remain constrained from raising prices to consumers by competition in the downstream market. *Amici* respectfully submit that this Court should hold that a plaintiff alleging predatory overbidding or overbuying must show (1) that the allegedly predatory bidding caused the defendant to price its output below an appropriate measure of cost, and (2) that the defendant's conduct created a dangerous probability that defendant would be able to recoup the costs of predation and harm consumers through the exercise of monopsony power in the input market or monopoly power in the output market.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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